

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA 2003 SEP 12 PM 7:29

In support of its motion, the United States separately files its Memorandum of Points and Authorities and a Proposed Order concurrently with this motion.

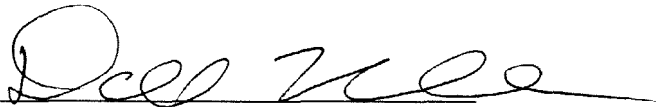
Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Dodge Wells", is written over a horizontal line.

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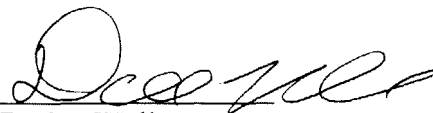
DATED: September 12, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ELOUISE PEPION COBELL, et al.,)	
)	
Plaintiffs,)	Civil Action No. 96-1285 (RCL)
)	
v.)	
)	
GALE A. NORTON, et al.,)	
)	
Defendants.)	
_____)	

**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF CIVIL PROCEDURE 26(c)**

Dodge Wells, one of the attorneys for the Interior defendants, hereby certifies that he conferred with Dennis Gingold, counsel for plaintiffs, by telephone on September 9, 2003 in a good-faith effort to resolve the issues raised by the foregoing motion for a protective order concerning the notices for the depositions of Terry Petrie, Michael Quinn and Sandra Spooner, and that he and Mr. Gingold have been unable to resolve the dispute. Mr. Gingold also declined a request to suspend the depositions until the Court has ruled on the foregoing motion for a protective order.



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DATED: September 12, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Plaintiffs,)	Civil Action No. 96-1285 (RCL)
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Defendants.)	
_____)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF THE MOTION OF THE UNITED
STATES FOR A PROTECTIVE ORDER AND THE MOTION
TO QUASH THE SUBPOENA ISSUED TO GOVERNMENT
TRIAL ATTORNEYS PETRIE, QUINN AND SPOONER**

Plaintiffs have noticed the depositions of Terry Petrie, Michael Quinn and Sandra Spooner for October 8, 14 and 17, 2003 respectively and have served each of the proposed deponents with subpoenas. Ms. Spooner is a Deputy Director in the Civil Division of the Department of Justice and is lead trial counsel for the United States in this case. Mr. Petrie and Mr. Quinn are trial attorneys employed by the Civil Division of the Department of Justice and are among the litigation counsel representing the United States in this case. Any information that Ms. Spooner, Mr. Petrie and Mr. Quinn have which is related to any conceivable issue in this case was obtained in their capacities as litigation counsel.

Plaintiffs may take the depositions of the United States' trial counsel only under limited circumstances which do not exist here. Further, plaintiffs are not authorized to take any depositions at this time, and, in fact, are precluded by Federal Rules of Civil Procedure 26(d) and

30(a)(2)(C) from doing so. Discovery for Trial 1.5 (as well as the trial itself) has been completed, and discovery has not commenced in any subsequent stage of this proceeding.

Federal Rule of Civil Procedure 26 provides the Court with broad discretion to issue orders prohibiting or limiting discovery. Fed. R. Civ. P. 26 (b)(2) & (3). Rule 26(c) provides that a court may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including . . . that discovery not be had." Further, Rule 45(c)(3)(A)(iv) provides that a subpoena shall be quashed if it subjects a person to undue burden. The circumstances here warrant both a protective order under Rule 26 and an order quashing the subpoena under Rule 45.¹ Accordingly, the Court should issue an order that the depositions not go forward and quashing the subpoenas. The notices of deposition incorporate document production requests. The document requests seek privileged documents and are ancillary to the impermissible deposition notices and subpoenas. Further, since discovery is not open, plaintiffs are not authorized to propound new requests for the production of documents. Therefore, the United States requests that the protective order also provide that no response to the document production requests is required.

FACTS

Plaintiffs are attempting to depose three trial attorneys about a controversy concerning the December 2002 schedule of Donna Erwin, her availability for a deposition during that month, and statements made to the Court by counsel during hearings on December 13 and December 17,

¹ Service of the subpoena on Ms. Spooner was defective because she was not tendered the required attendance and mileage fee. Fed. R. Civ. P. 45(b)(1). Therefore, she is not required to appear for her deposition. Ms. Spooner, who is not represented by private counsel, has authorized the United States to present this objection on her behalf. Messrs. Petrie and Quinn are represented by private counsel, who may make additional objections on their behalf.

2002 concerning Ms. Erwin's schedule. In February and March 2003, plaintiffs submitted document requests, to which the United States responded, concerning Donna Erwin's December 2002 schedule and her communications with the Department of Justice on her schedule, and they conducted depositions lasting two and a half days of Donna Erwin and Michelle Singer, an associate of Donna Erwin, during which they had a full opportunity to question Ms. Erwin and Ms. Singer on those issues. Although six months have passed since plaintiffs deposed Ms. Erwin and Ms. Singer and received the government's documents in response to the document production requests, plaintiffs have not attempted to show, and could not show, that the controversy concerning Ms. Erwin's December 2002 schedule was anything but a result of an unintentional, inadvertent misunderstanding.

The notices of deposition assert that the depositions are being conducted "pursuant to the February 5, 2003 Order." That order, reported as *Cobell v. Norton*, 213 F.R.D. 16 (D.D.C. 2003) (hereinafter the "Erwin Order"), addressed a motion to compel in connection with the deposition during discovery for Trial 1.5 of Donna Erwin, who was then the Acting Special Trustee.

On December 9, 2002, plaintiffs noticed Ms. Erwin's deposition, and defendants moved for a protective order. At a December 13, 2002 hearing on the motion for a protective order, Mr. Quinn stated his understanding that Ms. Erwin did not expect to be in Washington prior to January 6, 2003. Erwin Order, 213 F.R.D. at 19. The Court denied the motion for a protective order, but directed that Ms. Erwin be deposed in Albuquerque, New Mexico, where she resided. *Id.*

Ms. Erwin attended a Tribal Task Force Meeting in Washington that started December 16, 2002. The Court held a hearing on December 17, 2002, which Ms. Erwin attended. At the hearing, Mr. Petrie noted that the statements Mr. Quinn had made at the December 13 hearing

were based on information conveyed to Mr. Quinn by Mr. Petrie, and he explained at length the circumstances which had led to "an unintentional, inadvertent misunderstanding between what was represented to you [at the December 13 hearing] and what Ms. Erwin's plans were regarding this week." Erwin Order, 213 F.R.D. at 19-22.

At Ms. Erwin's deposition on December 20, 2002 (in Washington), counsel for plaintiffs asked a series of questions which the Court stated "may be paraphrased as 'To your knowledge, did government counsel make any misrepresentations to the Court during the December 17 hearing?'" *Id.* at 23. Ms. Spooner directed Ms. Erwin not to answer the questions, and plaintiffs filed a motion to compel. On February 5, 2003, the Court granted plaintiffs' motion to compel, and ordered that "[A]cting Special Trustee Donna Erwin be deposed by plaintiffs at a time and place determined by plaintiffs, and that she respond to the questions set forth in plaintiffs' above-mentioned motion to compel, and all other questions related to the subject matter of those questions." *Id.* at 32.

Ms. Erwin was deposed again on February 12 and 13, 2003. Although the line of questions set forth in plaintiffs' motion to compel and other possible questions related to the subject matter of those questions should not have taken more than an hour, the deposition consumed 10 hours. Despite the length of the deposition, plaintiffs never directly asked the question which the Court correctly saw as the crux of the motion to compel - whether, to Ms. Erwin's knowledge, government counsel made any misrepresentations to the Court during the December 17 hearing. Instead, plaintiffs dragged out the deposition through persistent attempts to elicit privileged information on other subjects.

Plaintiffs also deposed Michelle Singer on March 4, 2003. Ms. Singer is an associate of Ms. Erwin, and she communicated directly with Mr. Petrie concerning the notice for Ms. Erwin's

deposition and her schedule. The United States also produced documents through March 11, 2003, in response to document production requests included in the notices for the depositions of Donna Erwin and Michelle Singer. Thus, while discovery was open for Trial 1.5, plaintiffs submitted document requests, to which the United States responded, concerning Donna Erwin's December 2002 schedule and her communications with the Department of Justice on her schedule, and they conducted two and half days of depositions during which they had the opportunity to question Ms. Erwin and her office associate on those issues.

Plaintiffs stated at the close of the Erwin depositions that they had not completed their examinations of Ms. Erwin and Ms. Singer, but they made no attempt to schedule concluding sessions of those depositions during the Trial 1.5 discovery period. Discovery in Trial 1.5 was closed on April 10, 2003, and Trial 1.5 itself concluded on July 8, 2003.

ARGUMENT

I. PLAINTIFFS HAVE NOT AND CANNOT MAKE THE SHOWING NECESSARY TO DEPOSE OPPOSING COUNSEL.

Plaintiffs are not authorized to take the depositions of opposing counsel, including Ms. Spooner, Mr. Petrie and Mr. Quinn, except in limited circumstances which are not present here. While motions to prevent depositions are not routinely granted, the calculus is different when a party attempts to take the deposition of opposing counsel. Depositions of opposing counsel are disfavored. *Corporation for Public Broadcasting v. American Automobile Centennial Commission*, 1999 WL 1815561, at *1 (D.D.C. Feb. 2, 1999).

Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony. Finally, the

practice of deposing opposing counsel detracts from the quality of client representation. Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent. Moreover, the "chilling effect" that such practice will have on the truthful communications from the client to the attorney is obvious.

Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986). The mere request to depose an opposing counsel constitutes "good cause" for a protective order, unless the party seeking the deposition can show both the propriety and need for the deposition. *Dunkin' Donuts, Inc. v. Mandorico, Inc.*, 181 F.R.D. 208, 210 (D.P.R. 1998); *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85 (M.D.N.C. 1987). See also *Jennings v. Family Management*, 201 F.R.D. 272, 277 (D.D.C. 2001) ("[A] party seeking to depose an adversary's counsel must prove its necessity."). Therefore, plaintiffs have the burden of demonstrating that depositions of Ms. Spooner, Mr. Petrie and Mr. Quinn are necessary.

Courts which have considered the issue, including courts in the District of Columbia, have generally applied the three factor test set forth in *Shelton*, 805 F. 2d at 1327, requiring the party seeking to depose opposing counsel to show that: (1) no means exist to obtain the information other than deposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. *See Corporation for Public Broadcasting*, 1999 WL 1815561, at *1; *Jennings*, 201 F.R.D. at 277. See also *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628 (6th Cir. 2002); *Boughton v. Cotter Corp.*, 65 F.3d 823, 830 (10th Cir.1995); *D.O.T. Connectors, Inc. v. J.B. Nottingham & Co.*, 2001 WL 34104929 (N.D. Fla. Jan. 22, 2001); *Lajoie v. Pavcon, Inc.*, 1998 WL 526784 (M.D. Fla. June 24, 1998); *Dunkin' Donuts, Inc. v. Mandorico, Inc.*, 181 F.R.D. 208 (D. P.R. 1998) (citing numerous cases); *Pereira v. United Jersey Bank*, 1997 WL 773716 (S.D.N.Y. Dec. 11, 1997); *M & R Amusements Corp. v. Blair*, 142 F.R.D. 304, 305 (N.D. Ill.1992). Therefore, in

order to take the depositions of the trial attorneys, plaintiffs must show that Mr. Petrie, Mr. Quinn and Ms. Spooner have information that plaintiffs have been unable to obtain and cannot obtain from other sources; that the information which is only available through deposition of the trial attorneys is relevant and not privileged; and that the relevant, non-privileged information which is only available through deposition of trial attorneys is crucial to plaintiffs' preparation of their case. Plaintiffs cannot meet any of the governing factors which they must demonstrate in order to depose Ms. Spooner, Mr. Petrie or Mr. Quinn on matters related to the scheduling of Ms. Erwin's deposition.²

A. The Information is Available from Sources Other than Depositions of Opposing Counsel.

The courts have limited depositions of opposing counsel to those circumstances in which opposing counsel is the only available source of the factual information.³ In most cases, the non-privileged factual information can be obtained from some source other than a deposition of counsel, for example, by the deposition of another person or by serving interrogatories on the opposing party's counsel. Courts have required parties seeking to depose counsel to show that such sources are not available to them before allowing such a deposition to occur. See, e.g., Mike v. Dymon, 169 F.R.D. 376, 379 (D. Kan. 1996) (The party seeking to depose opposing

² If plaintiffs intend to address any other subjects in the depositions, they must identify the subjects and demonstrate that they meet the three factors as to those subjects. *Jennings*, 201 F.R.D. at 277.

³ For example, if a party is relying on an "advice of counsel" defense, there may be circumstances under which a deposition of counsel might be appropriate or where counsel is a "fact witness" because of his or her role in the underlying events or transactions upon which the claims are based. See e.g., Jennings, 210 F.R.D. 272, 277-78 (defendants had established that they could not obtain information about plaintiff's state of mind during relevant period other than through deposition of her counsel, who was also plaintiff's limited guardian). These circumstances are not present here.

counsel "must carry the burden to show that no other sources are reasonably available. To carry his burden, plaintiff must identify the specific unsuccessful measures he has taken to obtain the information, why they have failed, and that other resources are unavailable."); *M & R Amusements Corp.*, 142 F.R.D. at 306; *Marco Island Partners v. Oak Development Corp.*, 117 F.R.D. 418, 420 (N.D. Ill. 1987); *N.F.A. Corp. v. Riverview Narrow Fabrics*, 117 F.R.D. at 86.

Taken literally, the line of questions for which plaintiffs made a motion to compel related to Ms. Erwin's reaction to the December 17 hearing, and she therefore is the primary, or perhaps sole, source of the information. Taken most broadly, the line of questioning at issue in plaintiffs' motion concerned Ms. Erwin's schedule through January 6, 2003, her communications of her schedule to the Department of Justice, and the accuracy of statements made at the December 13 and December 17, 2002 hearings. Plaintiffs have numerous sources, other than depositions of opposing counsel, for obtaining information on these matters. The first source is the deposition of Donna Erwin.⁴ As discussed, plaintiffs also deposed Michelle Singer about Ms. Erwin's schedule and about Ms. Singer's discussions with Department of Justice attorneys concerning Ms. Erwin's schedule.⁵ The government also made an extensive document production in response to document requests included in the notices for the depositions of Ms. Erwin and Ms.

⁴ As discussed above, plaintiffs did not directly ask Ms. Erwin the questions for which they filed a motion to compel. However, any failure on their part to fully explore these subjects with Ms. Erwin or Ms. Singer is not a basis for satisfying the first *Shelton* factor. See *Boughton v. Cotter Corp.*, 65 F.3d at 830-31.

⁵ Defendants did not object to Ms. Singer's deposition, which was noticed and taken while Trial 1.5 discovery was still open. While Ms. Singer is a lawyer, she was not employed during the time in question as an attorney, and did not act as a lawyer representing the defendants or Ms. Erwin. See Erwin Dep. at 357:17-362:9, attached as Appendix A. Rather, she was the main contact in Ms. Erwin's office on the matter of Ms. Erwin's schedule, a subject the Court had found in the February 5, 2003 Order was relevant to Ms. Erwin's credibility and was therefore an appropriate subject of Trial 1.5 discovery.

Singer. The plaintiffs received memoranda prepared by Ms. Erwin and Ms. Singer concerning the hearing on December 17, and the events leading up to that hearing. Finally, Mr. Petrie made an extensive presentation at the December 17 hearing on these matters. Rather than constituting the only source of information, depositions of Ms. Spooner, Mr. Petrie and Mr. Quinn would simply be cumulative of information plaintiffs have received from numerous other sources.

B. The Information Sought by Plaintiffs is Not Crucial to the Development of the Plaintiffs' Case.

In addition to showing that the subjects of the proposed discovery are not privileged and are obtainable from no other source, plaintiffs also have the burden of showing that the issue upon which they wish to depose government counsel is crucial to proof of their case. See, e.g., *Shelton*, 805 F.2d at 1330; *Mike v. Dymon*, 169 F.R.D. at 379; *Harriston v. Chicago Tribune Co.*, 134 F.R.D. 232, 233-34 (N.D. Ill. 1990). "The deposition of an adverse attorney on central factual issues, rather than peripheral concerns, would weigh more heavily" in favor of the proposed discovery. *Johnston Development Group, Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 353 (D.N.J. 1990); accord, *Walker v. United Parcel Services, Inc.*, 87 F.R.D. 360, 362 (E.D. Pa. 1980) (denying deposition where the attorney's role not central to underlying dispute).

Plaintiffs cannot show that the depositions are necessary to obtain information crucial to the proof of their case. At this time, there is no case for them to prove, since the record on Trial 1.5 is closed. In any event, the factual circumstances concerning Ms. Erwin's schedule and travel plans in December 2002 and the communication of those plans to her attorneys has no conceivable bearing on any substantive issues in this case.

The Court found that the line of questions posed by plaintiffs to Ms. Erwin during her December 20, 2002 deposition which was the subject of the motion to compel were relevant to

her credibility as a potential witness in Trial 1.5. Erwin Order, 213 F.R.D. at 25. However, Trial 1.5 concluded two months ago. Moreover, although plaintiffs designated excerpts of her deposition, Ms. Erwin was not called as a witness by either side. There is no justification for conducting further discovery relating to the credibility of a person who was never called as a witness in a trial that has been completed. Further, Ms. Erwin is no longer Acting Trustee, and any suggestion that her credibility might be relevant to any further proceeding in this case would be pure speculation. In any event, testimony by an attorney that bears solely on the credibility of a potential witness is not the type of information which is sufficiently crucial to a party's case to justify a deposition of opposing counsel. *Walker v. United Parcel Services, Inc.*, 87 F.R.D. at 362.

The Court also stated that facts concerning Ms. Erwin's travel plans and whether she conveyed those plans to her attorneys were relevant to the credibility of the attorneys. Erwin Order, 213 F.R.D. at 25 n.3. However, as this Court recently noted, counsel for plaintiffs may not undertake a prosecution of possible sanctionable conduct of opposing counsel. *Landmark Legal Foundation v. E.P.A.*, 2003 WL 21715678 at *4 (D.D.C. July 25, 2003), citing *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 814 (1987). Despite the Court's expressed concerns about statements by defense counsel, the February 5, 2003 Order did not compel any discovery beyond the redeposition of Donna Erwin, which has occurred.

C. The Information Sought by Plaintiffs is Not Relevant and May be Privileged.

Plaintiffs also cannot meet the third *Shelton* factor, that the information sought through the deposition of government counsel is relevant and non-privileged. The Court has determined that communications made between Ms. Erwin and government counsel regarding her December 2002 schedule or her availability to be deposed in that month are outside of the scope of the

attorney-client privilege. Erwin Order, 213 F.R.D. at 25. However, information about her schedule is not relevant for the same reason that it is not crucial to plaintiffs' case - any information any deponent provided about Ms. Erwin's December 2002 schedule could not have any conceivable bearing on any substantive issue on which plaintiffs' counsel may appropriately conduct discovery at this time.⁶

Since Ms. Spooner, Mr. Petrie and Mr. Quinn have participated in this case solely as litigation attorneys, attempts to elicit information on any other topics would almost certainly involve the attorney-client privilege or work product doctrine, even if the subjects addressed in the depositions were somehow relevant to any issue in this case. Further, it appears from the requests for production included in the notices of depositions that plaintiffs do plan to attempt to elicit privileged information and work product on matters unrelated to Ms. Erwin's December 2002 schedule or her availability to be deposed in that month. For example, the notice of deposition for Ms. Spooner requests notes of all telephone conversations "placed to or made by Sandra Spooner concerning Donna Erwin since December 2002" (emphasis added), internal Department of Justice communications concerning the deposition of Donna Erwin, and all communications between Ms. Erwin's personal counsel and attorneys in the Department of Justice and any attorneys in the Solicitor's Office of the Department of the Interior.

Where the subject of an attorney deposition is closely interwoven with privileged matters, most courts have urged caution about permitting such a deposition absent unusual circumstances, requiring a strong showing of need for the testimony and the unavailability of other means to

⁶ Therefore, the protective order should also be issued on the additional and separate ground that the information sought by the depositions is not relevant to the claim or defense of any party and is not reasonably calculated to lead to the discovery of admissible evidence. Fed R. Civ. P. 26(b)(1).

obtain the needed information. See, e.g., Johnston Development Group, Inc., 130 F.R.D. 348 (caution appropriate where subject of deposition heavily intertwined with privileged or confidential information); *In re Arthur Treacher's Franchisee Litigation*, 92 F.R.D. 429 (E.D. Pa. 1981) (same). As the magistrate judge noted in *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. at 85 (M.D.N.C. 1987), often a deposition of a trial attorney "merely embroils the parties and the court in controversies over the attorney-client privilege and more importantly, involves forays into the area most protected by the work product doctrine - that involving an attorney's mental impressions or opinions."

Here, it appears from the document production requests that plaintiffs intend to go beyond questions concerning Ms. Erwin's schedule in December 2002, her availability for deposition during that month and her communications to counsel on her schedule - subjects well trod in the depositions of Ms. Erwin and Ms. Singer - and to inquire into subjects protected by the work product doctrine, the attorney-client privilege, and specific government privileges.

Much of the time during the Erwin and Singer depositions was consumed on efforts by plaintiffs to elicit privileged information on subjects totally unrelated to Ms. Erwin's December 2002 schedule and her communications with attorneys about her schedule. For example, plaintiffs attempted to question Ms. Erwin about discussions with an attorney which she testified was held solely to prepare her for her deposition. Frequent recesses were required to confer with the deponents to determine whether the government should assert a privilege, and to confer with attorneys responsible for the merits of this case for guidance about lines of questions that were unrelated to Ms. Erwin's schedule and communications with counsel about her schedule. Plaintiffs should not be permitted to repeat those performances through unauthorized depositions of opposing counsel.

II. Plaintiffs are Not Authorized to Conduct Any Discovery at This Time.

Even if plaintiffs were able to make the showing necessary to depose trial attorneys, discovery at this time is not authorized. Ms. Erwin's deposition, and the controversy about the scheduling of that deposition, was part of the discovery for Trial 1.5. Under the terms of the discovery scheduling order for Trial 1.5, fact discovery closed on March 24, 2003, and all discovery closed on April 10, 2003. See Appendix B. In fact, Trial 1.5 itself was completed two months ago. Discovery has not commenced on any subsequent proceeding in this case. The parties have not held a discovery planning conference pursuant to Federal Rule of Civil Procedure 26(f), and therefore plaintiffs are not authorized to take any depositions at this time. Fed. R. Civ. P. 26(d) and 30(a)(2)(C).

The February 5, 2003 Order on which plaintiffs rely granted their motion to compel in regard to the deposition of Donna Erwin and authorized plaintiffs to redepose Ms. Erwin on the questions set forth in plaintiffs' motion to compel. Erwin Order, 213 F.R.D. at 32. The further deposition of Ms. Erwin in anticipation of Trial 1.5 was the only discovery addressed by the February 5, 2003 Order. Plaintiffs redeposed Ms. Erwin on February 12 and 13, 2003, and had the opportunity to ask her at that time the questions set forth in plaintiffs' motion to compel. The February 5, 2003 Order did not compel the taking of any depositions other than Ms. Erwin's and did not extend the closing date for discovery. Consequently, the February 5, 2003 Order does not authorize plaintiffs to take the depositions in question at this time. The notices of deposition and

subpoenas are nothing more than attempts by plaintiffs' counsel to conduct unauthorized and impermissible free-standing investigations of opposing counsel.⁷

The notices of deposition also request "defendants and the deponent" to produce documents. The notice for the deposition of Sandra Spooner is Appendix C hereto. Discovery for Trial 1.5 has been completed. The parties have not held a discovery planning conference pursuant to Federal Rule of Civil Procedure 26(f) on any subsequent proceeding in this case. Therefore, plaintiffs are precluded under Fed. R. Civ. P. 26(d) and 34(b) from requesting defendants to produce documents.⁸ The service of the new document requests is clearly improper under Rule 34(b). The February 5, 2003 Order said nothing about document production, so that order does not authorize the untimely new requests made by plaintiffs.

III. A Protective Order Should Be Issued Regarding the Document Production Request.

As discussed in Part II above, the document production requests included in the notices of depositions are unauthorized at this time. However, even if plaintiffs were authorized to make new production requests at this time, a protective order should be issued relieving defendants and the putative deponents of responding to the requests.

⁷ Plaintiffs scheduled the depositions without conferring with government counsel. Assigned government counsel is not available on October 8 and 14, the noticed dates for the depositions of Mr. Petrie and Mr. Quinn. We understand that Mr. Petrie's and Mr. Quinn's private counsel are also not available on the dates scheduled by plaintiffs.

⁸ Rule 26(d) forbids the plaintiffs from seeking discovery "from any source" at this time, and plaintiffs therefore have no basis for requesting the putative deponents to produce documents.

The notices of deposition for Donna Erwin and Michelle Singer served by plaintiffs in February 2003 included document requests. The notice for the deposition of Michelle Singer is Appendix D.⁹ Defendants reasonably interpreted the production requests ancillary to the notices for the depositions of Ms. Singer and Ms. Erwin as calling for documents which constituted or reflected contemporaneous communications concerning Ms. Erwin's December 2002 schedule and her availability for a deposition during that month and produced documents accordingly. Plaintiffs did not submit any supplemental document requests while discovery for Trial 1.5 remained open.

The document requests included in the notices for the depositions of Mr. Petrie, Mr. Quinn and Ms. Spooner considerably overlap those included in the Erwin and Singer notices. To the extent that the current requests duplicate the earlier requests, the responsive, non-privileged documents have already been produced. However, to the extent the current requests differ from the Erwin and Singer requests, plaintiffs appear to be requesting information that is privileged, is work product, and/or is totally unrelated to Ms. Erwin's December 2002 schedule or communications about that schedule.¹⁰ Compare Appendix C and Appendix D. For example document request 2 to the Spooner notice requests documents concerning phone calls "concerning Donna Erwin since December 2002." This request appears to encompass all communications concerning Donna Erwin **except** contemporaneous discussions about her schedule and her availability for a deposition in December 2002. The request therefore seeks

⁹ The production requests included in the notice for the deposition of Donna Erwin were identical.

¹⁰ We say that the requests appear to request privileged or irrelevant information in part because the requests are vaguely and ambiguously drafted.

information which is neither relevant to Ms. Erwin's December 2002 schedule or availability for a deposition, nor is reasonably calculated to lead to the discovery of relevant evidence, even if there still were a proceeding to which it might arguably pertain. Further, the requests almost necessarily include privileged communications. Items 1 and 3 request documents concerning "strategies" or "strategic decisions," and therefore necessarily encompass work product, particularly given that the requests are made in connection with the planned depositions of trial attorneys. Item 4 requests communications with the Department of Justice with respect to "the notice of deposition or the deposition of Donna Erwin," which presumably encompasses the notice served in February 2003 and the sessions of the deposition held on February 12 and 13, 2003.¹¹ The request also appears to encompass all communications and work product within the government concerning the response to plaintiffs' motion to compel, the February 5, 2003 Order, and other unquestionably privileged litigation documents. However, the request is not relevant to Ms. Erwin's December 2002 schedule and her communications at that time to counsel about her schedule. Plaintiffs' new document requests essentially ask the government to generate a new privilege log, and therefore are unreasonable and unduly burdensome on their face.

¹¹ The government was represented at the February 2003 deposition of Ms. Erwin by different trial counsel, whose sole role was to defend the deposition and to respond to document requests included in the Erwin and Singer deposition notices. The request could be read as reaching the work product and privileged communications of these attorneys.

CONCLUSION

For the foregoing reasons, the United States requests that the Court enter an order granting this motion for a protective order and quashing the subpoenas served on Sandra Spooner, Terry Petrie and Michael Quinn.

Respectfully submitted,

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Associate Attorney General

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DATED: September 12, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

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ORDER

This matter coming before the Court on Defendant's Motion for a Protective Order and Motion to Quash the Subpoenas Issued to Terry Petrie, Michael Quinn, and Sandra Spooner, any responses thereto, and the record in this case, the Court finds that the motion should be granted,

IT IS THEREFORE ORDERED that the Plaintiffs are precluded from deposing Department of Justice attorneys Terry Petrie, Michael Quinn and Sandra Spooner,

IT IS FURTHER ORDERED that the subpoenas for the depositions of Terry Petrie, Michael Quinn and Sandra Spooner are hereby quashed,

IT IS FURTHER ORDERED that Terry Petrie, Michael Quinn, Sandra Spooner and the Defendants need not respond to the document production requests included in the notices for the depositions of Terry Petrie, Michael Quinn and Sandra Spooner.

ROYCE C. LAMBERTH
United States District Judge

DATED: , 2003

CC:

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Transcript of the Testimony of:
DONNA ERWIN

Date: February 12, 2003

Case: COBELL v DEPT. OF INTERIOR

NEAL R. GROSS & CO., INC.
1323 Rhode Island Ave., NW
Washington, DC 20005-3701

202.234.4433
fax 202.387.7330
info@nealrgross.com

1 A Yes, it was.

2 Q And did you --

3 A That I am aware of. I don't believe I
4 have ever met him, I had never met him or I had spoken
5 with him.

6 Q Had he ever attended a meeting at which
7 you had been -- I realize you attend meetings, and you
8 don't know who is in the audience. Were there any
9 smaller meetings that you are aware that he attended
10 that you were at?

11 A I don't know that. That is a -- that's
12 the reason I am saying that I don't ever recall
13 directly meeting him. He could have been at some
14 large meeting we attended or some meeting representing
15 Justice but not that I ever recall meeting him. We
16 attend many meetings.

17 Q Now, what is the role of Ms. Singer?

18 A Ms. Singer had been detailed from the
19 Solicitor's Office to work with us on the business
20 process modeling and to -- from that point when I
21 became acting special trustee, I asked her to assume
22 some additional responsibilities as assisting the

1 chief of staff duties in the Albuquerque office.

2 Q So was she basically your assistant who
3 happened to have legal skills?

4 A Yes.

5 Q During that time period, did she perform
6 as an attorney as part of your staff?

7 A No.

8 Q Why do you say that?

9 A Did she represent me as an attorney? She
10 was --

11 Q No, no, no. Did she consult with you as
12 a legal counselor?

13 A No.

14 Q So she wasn't really using her legal
15 skills in your mind?

16 A We were doing document production as an
17 additional thing such as that, which I thought was
18 helpful, but she was not directly there as legal
19 counsel.

20 Q When you say "document production," do you
21 mean in response to a document production demand in a
22 litigation?

1 A Correct.

2 Q Well, wouldn't that be using your legal
3 skills?

4 A It could be using your legal skills, but
5 it does not mean that she particularly was doing this
6 because she was an attorney.

7 Q Who detailed her to that assignment?

8 A That assignment? Which assignment is
9 that?

10 Q The one when she was first detailed from
11 the Solicitor's Office.

12 A Steve Griles, at our request, at our
13 request as we started working on business process
14 modeling.

15 Q Did you request someone from the
16 Solicitor's Office?

17 A We requested various people that -- and I
18 don't know that we requested her as a solicitor, but
19 we requested her from the Solicitor's Office.

20 Q Whose decision was it to request her?

21 A It would have been a joint decision
22 between myself, Jeff Lords at the time, Deborah

1 Maddox, who was helping us set up a team.

2 Q But you had the ultimate decision on that?

3 A Yes.

4 Q Did you select her? Did you handpick her
5 specifically for her talents?

6 A Yes.

7 Q What talents of hers were you trying to
8 obtain? Why did you pick her, instead of someone
9 else?

10 A She had been involved with trusts. She
11 had background in Indian matters. She was a very
12 self-motivator, she -- very diligent worker and very
13 organized. I thought she would also assist us in any
14 type of assistance we might need in getting answers
15 and coordinating with the Solicitor's Office.

16 Q Has she met your expectations in all of
17 those areas?

18 A Yes.

19 Q Does she generally interface for you with
20 people who call you?

21 A Yes.

22 Q What does she does, and what does your

1 secretary do?

2 A My secretary is much more making travel
3 arrangements, scheduling appointments, typing,
4 finalizing correspondence, more secretarial duties.

5 Michele is much more into the
6 organizational, making sure that things that are due
7 are timely, responded to, produced, or whatever action
8 is required is taken care of, basically that we're not
9 losing anything in the process, we're responding to
10 all action items on a timely basis.

11 And if there needs to be an appointment
12 set up, a meeting set up, a request for me to speak
13 somewhere, she is very diligent about working with my
14 secretary to schedule those.

15 Q So has she been interfacing with the
16 Solicitor's Office on your behalf?

17 A In my behalf in what?

18 Q On projects you are working on.

19 A Yes.

20 Q And she has been interfacing with the
21 Department of Justice with respect to this litigation
22 to the extent you are involved?

1 A Yes.

2 Q So it would be unusual, then, for an
3 attorney to call you directly; is that a fair
4 statement, a Justice Department attorney, for example?

5 A If I am available and not in a meeting and
6 someone needs to speak to me, I usually will take the
7 call. If I am in a meeting, then Michele is the next
8 person that would take that call and take care of it
9 or see if I needed to call back directly.

10 Q Okay. How long did your conversation with
11 Mr. Petrie last on 12/4?

12 A Fairly short, less than five minutes.

13 Q Just an introductory call?

14 A Yes.

15 Q And, to the best of your recollection,
16 between 12/20 and 12/4, when this call occurred, did
17 you talk to Mr. Petrie on the phone or any other
18 occasion?

19 A No.

20 Q Had you met with him on any other occasion
21 other than what you had testified to?

22 A No. I'm sorry. Would you give me the

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

OCT 17 2002

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

GALE A. NORTON, Secretary of the
Interior, et al.,

Defendants.

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

Civil Action Number 96-1285
(RCL)

PHASE 1.5 TRIAL DISCOVERY SCHEDULE ORDER

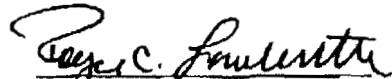
Upon consideration of the recommendation and report of the Special Master-Monitor on the Phase 1.5 trial discovery schedule, and it appearing to the Court that counsel for all parties agree to the schedule, it is hereby ORDERED that the following discovery schedule be adopted by the parties to this litigation in preparation for the May 1, 2003 Phase 1.5 trial:

<u>Date</u>	<u>Event</u>
October 7, 2002	Fact discovery opens
January 6, 2003	Deadline for the submission of Court-ordered plans
January 31, 2003	Deadline for filing summary judgment motions
February 28, 2003	Deadline for filing expert reports and for the identification of both parties' testifying experts (other than rebuttal experts)
March 7, 2003	Depositions of testifying experts begin
March 21, 2003	Depositions of testifying experts end
March 24, 2003	Fact discovery closes

March 31, 2003	Deadline for filing rebuttal experts' reports (if any) and for identification of both parties' testifying rebuttal experts
April 4, 2003	Depositions of testifying rebuttal experts begin
April 10, 2003	Depositions of testifying rebuttal experts end
April 11, 2003	Joint pretrial statements and witness lists
April 18, 2003	Pretrial conference

SO ORDERED.

Date: 10-17-02


Royce C. Lamberth
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs

v.

GALE NORTON, Secretary

Defendants.

Case No.1:96CV01285 (RCL)

NOTICE OF DEPOSITION and REQUEST FOR PRODUCTION OF DOCUMENTS

To: Sandra Spooner
1100 L St., NW
Room 10036
Washington, DC 20005

CC: Steven F. Benz
Kellogg, Huber, Hansen, Todd & Evans PLLC
Summer Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7929

Williams Bradford Reynolds
Howry, Simon, Arnold & White
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
202.383.6610 (fax)

PLEASE TAKE NOTICE – pursuant to this Court's February 5, 2003 Order, that on
October 14, 2003, at plaintiffs counsel's offices, 607 14th St, NW, 9th Floor, Washington DC,

20005, plaintiffs will take the deposition of Sandra Spooner.

This deposition will commence at 10:00 a.m. and will continue from day to day until completed. Testimony will be recorded by stenographic means.

PLEASE TAKE FURTHER NOTICE – Request is hereby made that defendants and the deponent produce the following documents related to the subject matter of this Court's February 5, 2003 Order:

1. All documents in paper or electronic format, including calendars, diaries, appointment books, schedulers, planners, Day-Timers, memoranda, and the like, including without limitation all such documents stored or created on computers or personal digital assistants, and any drafts thereof, which relate to, refer to, or otherwise embody, in whole or in part and in general or in particular, the December 2002 schedule for Donna Erwin, her availability for deposition, and all issues and strategies related thereto.
2. All phone logs (both incoming and outgoing), phone message books, and telephone message slips, including without limitation all individual phone memorandum slips together with the duplicate carbon or carbonless originals contained in the phone message books themselves (typically spiral bound), and all notes of telephone conversations maintained in such logs, which relate to or reference telephone calls, whether completed or not, placed to or made by Sandra Spooner concerning Donna Erwin since December 2002.
3. All documents that discuss, concern or reflect the scheduling of Donna Erwin's trip to Washington, D.C. on or about December 16, 2002 to participate in the Tribal Task Force meeting, including without limitation all communications with anyone regarding airline reservations and other travel arrangements or logistical and strategic decisions made with respect thereto.

4. All notes, including marginalia, reflecting communications, whether such communications were completed or merely attempted, between Sandra Spooner or any of her agents (including personal counsel) and/or Department of Justice employees, on the one hand, and Donna Erwin, or any Department of Justice or Solicitor's Office attorney (including without limitation communications made to or through an agent or employee of any such individual) with respect to any of the following subjects:
 - (1) the scheduling of Donna Erwin's trip to Washington, D.C. on or about December 16, 2002 to participate in the Tribal Task Force meeting, including without limitation all communications regarding airplane reservations, other travel arrangements, and logistical or strategic decisions made with respect thereto;
 - (2) the availability or unavailability of Donna Erwin for deposition in this litigation;
 - (3) the notice of deposition or the deposition of Donna Erwin; and
 - (4) the retention of personal counsel by Donna Erwin.
5. All documents that discuss, concern, reflect or constitute a communication between personal counsel for Donna Erwin and anyone representing or acting on behalf of defendants, and their managers or agents, including without limitation attorneys in the Solicitor's Office or the Department of Justice.

Respectfully submitted,

Of Counsel:

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303 447-8760

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404 815-6450

Attorneys for Plaintiffs

September 4, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs

v.

GALE NORTON, Secretary

Defendants.

Case No.1:96CV01285

NOTICE OF DEPOSITION and REQUEST FOR PRODUCTION OF DOCUMENTS

To: Mark E. Nagle
Assistant U.S. Attorney
Judiciary Center Building
555 Fourth Street, NW, Room 10-403
Washington, DC 20001

J. Christopher Kohn
United States Department of Justice
Civil Division
1100 L Street, NW, Room 10036
Washington, DC 20005

Attorneys for Defendants

PLEASE TAKE NOTICE that on **February 14, 2003**, at plaintiffs counsel's offices, the Native American Rights Fund, 1712 N Street, N.W., Washington D.C. 20036, plaintiffs will take the deposition of **Michelle Singer**, assistant to Acting Special Trustee Donna Erwin, 1849 C Street, NW, Room 7229, Washington, DC 20240.

This deposition will commence at **10:00 a.m.** and will continue from day to day until completed. Testimony will be recorded by stenographic means.

PLEASE TAKE FURTHER NOTICE – Request is hereby made that defendants and the deponent produce the following documents related to the subject matter of this Court's February

5, 2003 Order:


1. All documents, including calendars, diaries (including Ms. Singer's "green book" if she uses one), appointment books, schedulers, planners, Day-Timers and the like, including without limitation all such documents stored or created on computers or personal digital assistants, and any drafts thereof, which documents show in whole or in part the schedule for December 2002 and January 2003 for Ms. Erwin and Ms. Singer.
2. All phone logs (both incoming and outgoing), phone message books, and telephone message slips, including without limitation all individual phone memorandum slips together with the duplicate carbon or carbonless originals contained in the phone message books themselves (typically spiral bound), and all notes of telephone conversations maintained in such logs, which documents relate to or reference telephone calls, whether completed or not, placed to or made by Ms. Singer and Ms. Erwin during the month of December 2002.
3. All documents that discuss, concern or reflect the scheduling of Donna Erwin's trip to Washington, D.C. on or about December 16, 2002 to attend the Tribal Task Force meeting, including without limitation all communications with other government officials – including but not limited to Secretary Norton, Deputy Secretary Griles, and Special Trustee-designate Ross Swimmer – and all documents with respect to transportation (*e.g.* airplane and ground transportation) and hotel reservations made with respect thereto.
4. All notes of communications, whether such communications were completed or merely attempted, between Donna Erwin, Ms. Singer or any of other agent of Ms. Erwin (including personal counsel) or Ms. Singer or Interior employees working at Ms. Erwin or Ms. Singer's direction, on the one hand, and any Department of Justice or Solicitor's Office attorney (including without limitation


communications made to an agent or employee of any such attorney) with respect to any of the following subjects:

- (A) The scheduling of Donna Erwin's trip to Washington, D.C. on or about December 16, 2002 to attend the Tribal Task Force meeting, including without limitation all communications with respect to transportation (e.g. airplane and ground transportation) and hotel reservations made with respect thereto;
 - (B) the availability or unavailability of Donna Erwin for deposition in this litigation;
 - (C) retention of personal counsel by Donna Erwin.
5. All documents that discuss, concern, reflect or constitute a communication between personal counsel for Donna Erwin and anyone representing or acting on behalf of defendants, including without limitation attorneys in the Solicitor's Office or the Department of Justice.

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1712 N Street, NW
Washington, DC 20036-2976

Attorneys for Plaintiffs

February 6, 2003

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 12, 2003 I served the foregoing *Motion of the United States for a Protective Order and Motion to Quash the Subpoenas Issued to Terry Petrie, Michael Quinn, and Sandra Spooner*; and *Memorandum of Points and Authorities in Support of the Motion of The United States for a Protective Order and the Motion to Quash the Subpoena Issued to Government Trial Attorneys Petrie, Quinn and Spooner* by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
607 - 14th Street, NW, Box 6
Washington, D.C. 20005
(202) 318-2372

Per the Court's Order of April 17, 2003,
by facsimile and by U.S. Mail upon:

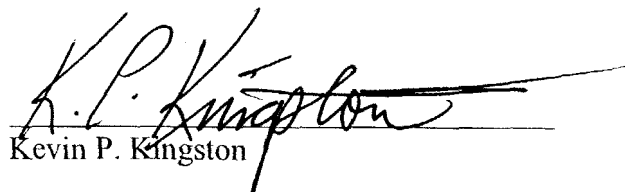
Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
(406) 338-7530

By U.S. Mail upon:

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Atlanta, GA 30309-4530

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Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans,
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K. Lee Blalack, Esq.
O'Melveny & Myers, LLP
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Washington, D.C. 20004-1109


Kevin P. Kingston